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**CALIFORNIA COASTAL COMMISSION**
SOUTH CENTRAL COAST AREA
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| Hearing Date: | 7/11-14/00 |

## STAFF REPORT: REGULAR CALENDAR

**APPLICATION NO.:** 4-99-211

**APPLICANT:** Mark Lever

**AGENTS:** Alisa Morganthaler Lever, Esq. & Clare Brownowski, Esq., of Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP; and Donald Schmitz; of Schmitz & Associates.

**PROJECT LOCATION:** 28827 Grayfox Street, City of Malibu, County of Los Angeles

**PROJECT DESCRIPTION:** The applicant proposes to construct a 5,035 sq. ft., two-story, 18 ft. high above finished grade, single family residence with 1,034 sq. ft. attached 4-car garage; install 2,000 gallon tank/septic disposal system to serve the residence, construct swimming pool, driveway, walkways and decks; detached 762 sq. ft., two-story guest unit with attached 298 sq. ft. garage and separate 1,000 gallon tank/septic disposal system; and grade approximately 1,479 cu. yds. of material (1,181 cu. yds. cut, 298 cu. yds. fill), and dispose of 883 cu. yds. of excess graded material at an unspecified location outside of the coastal zone.

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| LOT AREA: | 45,790 sq. ft. (1.05 acres) | Driveway Coverage: | 4,769 sq. ft. |
| Main House Footprint: | 3,776 sq. ft. | Terraces, Walks, Porches: | 3,361 sq. ft. |
| Main Garage (4-car) Footprint: | 1,034 sq. ft. | Ornamental Landscaping | 8,900 sq. ft. |
| Guest House Footprint: | 452 sq. ft. | | |
| Guest Garage (1-car) Footprint: | 298 sq. ft. | | |
| TOTAL BUILDING COVERAGE: | 5,560 sq. ft. | | |
| TOTAL HARD SURFACES: | 13,690 sq. ft. (including driveways, terraces, porches and walks) | | |
| Fuel modification area: | 23,140 sq.ft. | | |

**IMPORTANT PROCEDURAL NOTE:** This item was postponed from the Commission's May agenda at the applicant's request, and the applicant further requested that the item not be rescheduled on the Commission's June agenda due to a resultant conflict with the applicant's previously scheduled vacation. The 180-day review period for this project ended on May 13, 2000, but was extended 90 days (until July 26, 2000) by agreement between applicant and staff, on April 28, 2000. Therefore, the Commission must act on this project at the July hearing and no further extensions or postponements are available due to Permit Streamlining Act requirements.

**SUMMARY OF STAFF RECOMMENDATION:** Staff recommends **denial** of the project as proposed for three reasons: 1) the project as proposed is inconsistent with the policies of Chapter 3 of the Coastal Act—specifically policies that require the protection

of coastal waters and environmentally sensitive habitat and policies that require the minimization of landform alteration and address the individual and cumulative impacts associated with locating new development; 2) approval of the proposed project would prejudice the City's ability to prepare a Local Coastal Program (LCP) that is certifiable by the Commission; and 3) feasible alternatives exist which would lesson or avoid the adverse environmental impacts posed by the project within the meaning of the California Environmental Quality Act (CEQA), but which the applicant has not proposed.

The applicant asserts that the relocation of the development footprint will reduce or eliminate private, bluewater ocean views that would otherwise be available from the proposed residence if constructed in accordance with the plans submitted by the applicant.

**LOCAL APPROVALS RECEIVED:** City of Malibu: Planning Approval in Concept, dated August 10, 1999; Environmental Health Department, septic approval, dated July 29, 1999, Biological Review, dated August 3, 1998; County of Los Angeles, Fire Department, Forestry Division, Prevention Bureau, Preliminary Fuel Modification Plan, dated March 21, 2000.

**SUBSTANTIVE FILE DOCUMENTS:** Certified Malibu/Santa Monica Mountains Land Use Plan (LUP); "Geologic and Soils Engineering Exploration, Proposed Residence and Private Sewage Disposal System, 28827 Grayfox Street, Malibu, California," for Mark Lever, dated October 15, 1997, prepared by Grover Hollingsworth and Associates, Inc.; "Geologic and Soils Engineering Update, Proposed Residence and Private Sewage Disposal System, 28827 Grayfox Street, Malibu, California," addressed to Mark Lever and to the attention of Douglas Lindflors; "Terrestrial Plant Ecology," second edition, Michael G. Barbour, University of California, Davis, Jack H. Burk, California State University, Fullerton, and Wanna D. Pitts, San Jose State University, The Benjamin/Cummings Publishing Company, Inc., 1987; a bound volume of approximately 200 pages submitted by the applicant on April 12, 2000 with three separate, but attached cover letters, each dated April 11, 2000 (one from Don Schmitz, two from Alisa Morganthaler Lever), and including photographs, maps, and plans in pocket pages therein; Survey of 28827 Grayfox Street (scale: 1/8" = 1 ft.) by Robert A.
MacNeil, dated July 7, 1998; Grading and Drainage Plan, prepared by John M. Cruikshank, dated July 22, 1999; and Emergency Coastal Development Permit No. 4-99-261-G (Lever).

## STAFF RECOMMENDATION:

## I. STAFF RECOMMENDATION OF DENIAL:

Staff recommends that the Commission adopt the resolution set forth below, via the following motion:

## A. MOTION:

***I move that the Commission approve Coastal Development Permit No. 4-99-211 for the development proposed by the applicant.***

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

## B. RESOLUTION TO DENY THE PERMIT:

The Commission hereby denies a coastal development permit for the proposed development on the ground that the development will not conform with the policies of Chapter 3 of the Coastal Act and will prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

## I. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

## A. BACKGROUND SUMMARY

### 1.0 Proposed project and environmental setting

The proposed project involves the placement and construction of a single family residence on a deep, rectangular, approximately 1-acre lot at 28827 Grayfox Street, in the Point Dume area of the City of Malibu. A relatively level upper terrace comprises approximately the first two-thirds of the rectangular parcel as measured from the entrance on Grayfox. The terrace slopes gradually to approximately the rear one-third of the parcel, which descends sharply to the northeast into Malibu Riviera Canyon.

The applicant proposes to construct a 5,035 sq. ft., two story, 18 ft. high above finished grade, single family residence with 1,034 sq. ft. attached 4-car garage; install a 2,000 gallon tank/septic disposal system to serve the main residence, swimming pool, driveway, walkways and decks; to construct a detached 762 sq. ft., two-story guest unit with attached 298 sq. ft. garage and separate 1,000 gallon tank/septic disposal system; and grade approximately 1,479 cu. yds. of material (1,181 cu. yds. cut, 298 cu. yds. fill), and dispose of 883 cu. yds. of excess graded material to an unspecified location outside of the coastal zone.

The applicant's project is a relatively unusual design involving the construction of a 5,341 sq. ft., two-story, multi-level single family residence designed as a series of compartments cascading diagonally down the gently sloping upper terrace and then descending down a steeper portion of the slope toward the bottom of Malibu Riviera Canyon. A significant portion of the proposed residence (about one-third) will be constructed below the 90-foot top-of-slope contour, and will thus be located within the sensitive habitat of the canyon.

The applicant has been notified that discrepancies exist between the project described in the application and the actual to-scale plans on file. Revised plans have not been submitted, therefore the project described herein is the project shown on the to-scale plans (including the grading plan) on file.

Specifically, the project description set forth in the application states that the proposed guest unit is 750 sq. ft.; however the plans show that the unit would be 762 sq. ft. The Commission notes that guest units in the Malibu/Santa Monica Mountains are limited to a maximum of 750 sq. ft. and that revised plans would therefore have been necessary to bring the proposed second unit into conformance with this requirement if the Commission approved the proposal.

## 2.0 Environmental Setting

Malibu Riviera Canyon is one of the coastal canyons of the Point Dume area identified as a Disturbed Sensitive Resource Area (DSR) on the certified Malibu/Santa Monica Mountains Land Use Plan. The DSR designation indicates that the habitat is an Environmentally Sensitive Habitat Area (ESHA) that has been disturbed by the encroachment of development, and therefore no longer retains the seamless habitat value and diversity of more remote and less disturbed habitat areas. DSR areas are frequently invaded by non-native, invasive exotic plant species that escape from nearby ornamental gardens, and are subject to increased volume and velocity of runoff from the increased impervious surfaces of upslope development and resultant erosion, noise, night lighting, fuel modification, and the placement (often without the benefit of the necessary permits) of footpaths, fences, bridges, corrals, and other accessory structures on the slopes and canyon bottoms.

In addition, the Malibu Riviera Canyon has been a popular residential area for decades and therefore many pre-Coastal Act structures have been built on, and adjacent to, the canyon slopes. Before 1996, fire hazard mitigation requirements of the Los Angeles County Fire Department required the seasonal removal of fine, dry flashy fuels such as grasses and ruderal annuals and dead shrubs or trees up to 100 feet from structures. The Fire Department did not (and for pre-1996 development still does not) require the removal of healthy shrubs and trees.

Since 1996, as discussed below, these "brush clearance" requirements have been replaced for new structures with a fuel modification approach that relies on individual fuel modification plans approved by the fire department's foresters. These plans

implement the 1996 Fuel Modification Ordinance adopted by the County Board of Supervisors and extend the zone of vegetation disturbance much further (as much as 200 feet) into the areas surrounding defensible structures. The Fire Department has confirmed that these standards apply only to new development authorized after the adoption of the 1996 ordinance. The fire department staff have informed the Commission staff that structures on Point Dume built prior to 1996 are still subject only to the seasonal brush clearance requirements for removal of dead vegetation and fine, flashy fuels prior to the onset of fire season, for a distance of up to 100 feet from the subject structure, or to the subject parcel boundary. Offsite clearing of vegetation on adjoining properties has not historically been required by the Fire Department of pre-1996 development on Point Dume, and this is verified by the Commission's aerial photograph archives. Fire Department staff have further confirmed that offsite clearing is not presently required for pre-1996 structures.

On the other hand, new development on Point Dume may require fuel modification up to 200 feet from the subject structures, including lands on adjacent parcels up to the 200-foot radius from applicable development. This includes clearance of vegetation offsite, unlike the fire hazard management practices applicable to pre-1996 development.

For these reasons, fuel modification changes applicable since 1996, and which apply to the applicant's proposal, raise significant new implications for impacts to natural vegetation on the sensitive canyon slopes and riparian corridors on Point Dume. These new impacts may further reduce what remains of these canyon habitats, which are remnant ESHAs. These canyon habitats are more fragmented and fragile than undisturbed native habitat, recover from disturbance more slowly than robust habitat, and are prone to colonization by non-native species when disturbance removes native vegetation from highly erodible canyon slopes.

The Point Dume canyons contain intermittent blueline streams that may dry up on the surface during late summer and early fall, but even then groundwater is usually elevated beneath the surficially dry stream corridors. The shallow groundwater provides a relatively mesic (moist) summer environment for deeply rooted sage scrub and chaparral shrub species, as well as typical riparian species such as sycamore and willow, which flourish in many of the Point Dume canyon bottoms. Many authorities consider these conditions to represent riparian habitat, even when water is not visible on the surface. The shrubs growing in such conditions frequently produce closed canopies with heights of six to ten feet, with almost tree-like architecture.

Coyote bush (*Baccharis pilularis*) tends to be the predominant shrub in much of the Point Dume area, and is the most abundant native plant on the portion of the applicant's parcel that slopes downward into Malibu Riviera Canyon. Coyote bush is a common representative of the vegetation type generally known as southern coastal sage scrub (or occasionally referred to as "soft chaparral") (Exhibit 9).

Malibu Riviera Canyon bisects much of the Point Dume coastal terrace, and comprises one of the most extensive stretches of natural habitat and wildlife corridor remaining on

Point Dume. The intermittent blueline stream meandering the canyon bottom outlets to the Pacific Ocean, less than one half mile downstream from the subject site. The stream channel is located immediately adjacent to the parcel line of the applicant's lot at the bottom of the canyon.

The Malibu Riviera Canyon habitat is the fragile remnant of a far more robust environmentally sensitive habitat area that once existed on the unique headlands and terraces of Point Dume. Most of the flatter terrace areas connecting the Point Dume canyons have already been lost – first to agriculture in the middle of the last century--and more recently to residential development in this highly desirable area of Malibu. The only significant habitat left in the coastal canyons of Point Dume occurs on the canyon slopes and bottoms such as those the applicant seeks to develop or modify through the subject proposal.

The Point Dume coastal canyons are located on the Pacific Flyway, and offer critical transitional habitat between the marine and terrestrial ecosystems that converge near the subject site. These corridors constitute a significant habitat refuge for a wide variety of birds and animals that rely on them year around or during specific migration seasons or lifecycle stages. The habitat that would be eliminated or modified if the applicant's project is constructed as proposed cannot be replaced, particularly in the unique biogeographic context of Point Dume.

Obviously, the sensitive canyon habitat cannot be moved. As explained in detail in the findings below, further fragmentation and modification of the remaining vegetation in Malibu Riviera Canyon will diminish the buffering effects of the vegetation flanking the canyon slopes and stream channels. Resultant erosion will degrade not only the immediately downgradient water quality, but will charge the runoff waters entering the marine environment immediately downstream with sediment pollution and the other pollutants common to urban runoff. The sensitive kelp beds located immediately offshore on Point Dume may be degraded by such chronic adverse impacts. In addition, the canyon's direct value as a wildlife corridor and refuge will be diminished by the reduction in mature native brush cover that is required to achieve contemporary fuel modification standards (crown separation of at least fifteen feet, height limit of no more than two feet, and limits on allowable native species that exclude the majority of the coastal sage scrub brush assemblage). All of these impacts, taken individually and cumulatively, degrade not only the immediately affected area of the applicant's parcel, but the entire canyon habitat corridor.

**3.0 Discussion of feasible alternative(s)**

As noted, the applicant proposes to construct the proposed project within the environmentally sensitive habitat area of a portion of Malibu Riviera Canyon intersected by the applicant's parcel. In addition to the habitat area lost by the actual placement of structures on the canyon slope, the Los Angeles County Fire Department, Forestry Division, will require permanent fuel modification of the remaining canyon vegetation on the subject parcel. These requirements will extend significant vegetation clearance,

thinning, height reductions, and species composition restrictions over the entire slope area of the applicant's parcel and these impacts will also extend into the streambed adjacent to the applicant's property line at the canyon bottom.

Construction on the slope is not necessary to achieve an adequate development envelope on the subject site. Commission staff has determined that one or more feasible alternatives exist that would protect the canyon slopes and provide for the construction of a residence, albeit of a different design, and that such alternatives could be favorably considered under the Chapter 3 policies of the Coastal Act.

A large, nearly level pad area is situated immediately adjacent to the site entrance off Grayfox Street. The project plans conceptually approved by the City of Malibu show a front yard setback from Grayfox Street of 65 feet. This setback removes over 5,250 square feet of level building area from the applicant's available building footprint. Returning part of the area captured by this rather deep setback to the area available for construction would facilitate the redesign and relocation of the proposed residence away from the canyon slope, thereby protecting the canyon's environmentally sensitive habitat.

The applicant has not submitted evidence that he has sought relief from the present 65-foot street setback or that he has been denied the necessary variance from the City in response. Instead, the applicant's agent has stated in supplemental correspondence with staff dated April 11, 2000 (page 10) that:

> "…The subject lot is subject to a sixty-five (65) foot setback from the street by the City of Malibu. Accordingly, should the proposed house be moved closer to the street as proposed by CCC staff, a variance will be required from the City of Malibu, an expensive proposition with little likelihood of success…."

Commission staff has been informed by City staff that the applicant could seek a reduction in the frontyard setback (65 feet) presently required by the City for the subject proposal. requirements. City of Malibu Senior Planner Drew Purvis, at the request of Commission staff on June 21, 2000, explained that the City planning staff reviews over 100 requests in a typical year for minor modifications to required setbacks, and that planning staff is authorized to administratively approve reductions of up to 50% from frontyard setbacks and up to 20% from sideyard setbacks provided that private coastal view impacts or community character conflicts do not arise as the result of modifying the applicable setbacks. Mr. Purvis indicated that the turnaround time for this review is typically a matter of three to six weeks, and that if the staff refuses to grant the requested modification, the applicant is entitled to seek approval from the Planning Commission and ultimately from the City Council.

To illustrate the effect a change in the frontyard setback would have on the available development envelope on the subject site, the Commission estimates that if the applicant obtained a variance to reduce the present 65-foot front yard setback to a more moderate 25-foot setback (though this represents a slightly greater reduction than the approximately 32 –foot setback that could be authorized administratively by the City

staff), and retained the existing total of approximately 28 feet of combined sideyard setbacks (25% of lot width as required by the City), and if the footprint of the proposed development was relocated to a minimum of 100 feet streetward (south/southwest) of the 90-foot contour (top-of-slope), thereby avoiding fuel modification and other adverse impacts upon the canyon's sensitive habitat, the applicant would still have a remaining potential building footprint of approximately 11,700 square feet. As noted in further discussion below, an alternative has also been identified that would setback the project only 50 feet from the 90-foot contour, thus increasing the potential alternative building envelope by approximately 6,000 additional square feet and thereby producing a more-than-adequate potential building envelope of at least 17,000 square feet.

These options illustrate that a range of potential siting and design alternatives exist That would avoid the significant, adverse impacts on coastal resources that will result if the proposed project is constructed on the canyon slopes as shown in the project plans.

An additional consideration is the more favorable the topographic relief of the upper terrace of the subject parcel, which is almost flat with a gradual slope transition that would require little, if any grading, other than pad grooming and compaction and the excavation of footings (or, grading volumes could be redirected toward the construction of a below-grade garage to further maximize the use of the buildable area). In addition, the extensive foundation measures recommended by the applicant's geotechnical consultant for the purpose of constructing the proposed project on the steeper area at the rear of the parcel could probably be avoided by constructing a more conventional design on the level portion of the site.

The applicant has informed staff that the 18.0 ft. height limit above grade that has been applied by the City to the to present design is only necessary if the structure is situated within a pie-shaped slice of the lot where development could block adjacent private ocean views if the structure located in that area were any higher. The applicant has further clarified that if the structure is limited to 18 ft. in height, a more extensive review process at the City level is thereby avoided.

If the project were redesigned in the alternative envelope identified herein, it appears that the private ocean views of the neighbor at 28837 Grayfox Street would not be affected by the alternative structure, and construction of a conventional two story residence and guest unit exceeding 18 ft. in height could therefore presumably be approved by the City.

If the project is set back as described above, with a redesigned floor plan and the garage located beneath the main floor, the total potential square footage of living space would increase as the result. As noted, the alternative setback would move the subject residence out of the line of sight of most, or all, of the residence next door at 28837 Grayfox, thereby eliminating height constraints imposed by the City (though not a consideration under Chapter 3 of the Coastal Act, which does not protect private views).

In addition, the Commission notes that in conjunction with the other aspects of a redesigned project alternative, the applicant could develop a landscape plan that incorporates, for example, an expansive stone terrace above the top-of-slope and a swimming pool near that area of the parcel, thereby creating attractive recreational amenities to capture the bluewater views looking out over the canyon toward the Pacific Ocean. Such a setting would offer the applicant and his guests leisure and entertainment areas with permanent, unobstructable views of the Pacific Ocean. These features would not require fuel modification downslope if designed in accordance with the fire department's requirements.

As outlined above, the applicant can relocate the proposed project elsewhere on the ample developable area that remains if the presently proposed project is setback a minimum of 100 feet commencing from the 90-foot elevation contour marking the top-of-slope of Malibu Riviera Canyon.

In addition, since the publication of the previous staff report prepared for the Commission's May hearing, the Commission staff has developed an additional alternative that has been evaluated and conceptually approved by the Los Angeles County Fire Department Fuel Modification Unit. This alternative would require the construction of a fire wall six feet in height to be constructed at the 85-foot elevation contour, with a setback of 50 feet upslope from the 90-foot elevation contour (top-of-slope as determined by Commission staff). The slope between the 90-foot contour and the downslope 85-foot contour (approximately 20 linear feet) would be subject to fire department restrictions on species composition and height limits, but the remainder of the sensitive canyon habitat downslope of the wall (to, and including, the stream corridor) would be allowed to recover to mature coyote bush-dominated cover with no annual thinning or other modofication requirements of any kind.

Upon request by Commission staff, the Fuel Modification Unit staff stated that if a firewall was constructed at the 85-foot elevation contour and the proposed project was setback only 20 feet upslope from the 90-foot elevation contour, a minimum of 30 feet of canyon habitat downslope from the firewall would require fuel modification. This section of the slope is steep and perpetual fuel modification practices in this sensitive area of the canyon would result in significant adverse impacts as discussed in detail in this report. As outlined above, alternatives to such a location clearly exist that would avoid fuel modification on all, or most of, the canyon slope altogether.

For the above reasons, feasible alternatives have been identified that would allow the applicant to redesign the project to a more conventional design on the upper portion of the subject parcel, or to retain the essence of the present design but with lesser modifications and the construction of a firewall in concert with the setbacks described above from the 90-foot top-of-slope contour. Thus, at least two alternatives have been identified that either completely, almost completely avoid fuel modification in the canyon. In addition, these alternatives would reduce or avoid other impacts posed by development on the canyon slope, such as increased erosion, polluted runoff, disturbance to wildlife, and other impacts addressed more fully below.

## 4.0 Primary issue: Protecting ESHAs where feasible alternatives exist

The primary issue raised by this application is whether the Chapter 3 policies of the Coastal Act permit the approval of development within the environmentally sensitive canyon slopes and coastal streams of Point Dume, in the City of Malibu—particularly where feasible alternatives exist to relocate/redesign the project elsewhere on the subject site—and to thereby avoid the adverse impacts to coastal resources that would otherwise occur.

The applicant asserts that if the proposed residence is set back from the canyon slope sufficiently to avoid direct project impacts on the environmentally sensitive canyon habitat, including the impacts associated with fuel modification of the canyon vegetation, the bluewater ocean view available from the presently proposed residence may be reduced or eliminated as the result.

The applicant submitted new information on April 12, 2000 including an appraisal of the proposed project's market value and the appraiser's estimates of the diminished market value of a hypothetically relocated structure that in the appraiser's opinion would result from project alternatives to avoid the canyon slope. (Appraisal report prepared April 7, 2000 by Adler Realty Advisors, Inc., Exhibit 8).

The applicant asserts that failure to approve the size and location of the residence he proposes would constitute a "taking" because he would be unable to construct a residence with an ocean view. The Commission does not agree. If the proposed residence size and location is not approved, the applicant may seek approval for construction of a residence at a different location on his property. Such a residence would provide a reasonable use of the property, even if it did not have an ocean view, and there would not be a taking. The applicant has not submitted evidence indicating that disapproval of the proposed residence size and location would deny all reasonable use of the property or interfere with his reasonable investment-backed expectations.

In fact, the evidence submitted by the applicant indicates that denial of his proposal would clearly still allow a reasonable use of the property. The applicant's appraisal indicates that it would be profitable to build a smaller house of 3,000 square feet, with no accessory structures or ocean view. It is assumed that this smaller residence would be setback a minimum setback of 100 feet from the top-of-slope from the top of the canyon.

The Commission has not reviewed the financial assumptions used in the applicant's analysis and has not determined whether the appraisal's conclusions are accurate. This limitation notwithstanding, and as discussed above, an additional alternative has been identified by staff since the publication of the previous staff report and the preparation of the referenced appraisal, which would only require a 50-foot setback from the top-of-slope. This alternative adds approximately 6,000 square feet of area to the potential building envelope. The value of the resultant residence and accessory structures that

might be placed on the enlarged buildable area identified in this alternative has not been evaluated by the applicant's appraiser.

Thus, while the applicant's analysis shows that it would be feasible and profitable to construct the smaller residence, the Commission also finds that other feasible options for constructing a residence larger than 3,000 square feet exist that would setback the project sufficiently from the top of the canyon. These options include, but are not limited to, relocating/redesigning the residence and/or seeking a modification of, or variance from, the 65-foot frontyard setback presently required by the City of Malibu, or constructing a firewall near the top-of-slope and incorporating the necessary setbacks described above that have also been determined acceptable by the Los Angeles County Fire Department.

## 5.0 Staff review of subject proposal

The Commission staff has met extensively with the applicant and the applicant's agents both before and since the present application was submitted in September of 1999 and filed in November. The Malibu regulatory and enforcement supervisor, John Ainsworth, met with the applicant and his agent at their request on February 26, 1998 to provide an initial evaluation of the Coastal Act issues that would be raised by the applicant's proposal. Two supervisors, including the South Central Coast District Manager, have visited the subject site on two additional occasions since the pending application was submitted. At the meetings and site visits the staff explained and confirmed that the project encroached significantly into the Malibu Riviera Canyon environmentally sensitive habitat and would pose significant fuel modification impacts to the canyon vegetation. Staff explained to the applicant even before the application was submitted for formal review that staff would likely recommend sufficient setbacks to avoid disturbance of the sensitive canyon and riparian areas, particularly in light of the large, relatively flat area closer to the street that was not being fully used in the project design.

The applicant and the applicant's agent were notified in January, 2000 that the preliminary recommendation of the Commission staff was for denial of the proposed project as submitted, and they were again notified that this was the pending recommendation in February, after the second evaluation of the project at the monthly staff project review. The applicant was advised that staff had identified alternatives that would lessen the project's potential adverse effects upon the sensitive habitat yet provide for a substantially similar development, though possibly with reduced ocean views from the main residence.

Since that time, and subsequent to the publication of the staff report for the subject proposal for the May agenda, the staff has met further with the applicant to review the potential alternatives and the requirements of the fire department vis-à-vis fuel modification. The applicant has not submitted revised plans incorporating any of the suggestions of Commission staff.

## 6.0 Unauthorized grading and vegetation removal that has been undertaken on site without the benefit of a coastal development permit.

Staff determined during an initial site visit for the pending application (No. 4-99-211) in November, 1999 that the site had been cleared on an unspecified previous date, the slope graded to well below the top-of-slope area—to approximately the 70-foot elevation, from the side yard boundary to side yard boundary on the parcel—and vegetation to the same elevation completely stripped to mineral earth. No slope stabilization measures had been implemented for the graded area. Staff suggested that temporary slope stabilization measures be implemented during the forthcoming winter season. Staff subsequently issued Emergency Coastal Development Permit No. 4-99-261-G, on November 30, 1999 to implement these measures.

The applicant's current proposal includes grading that area to build the proposed structure. Although the grading already occurred, the Commission evaluates this application as if the resources were still there and applies the Chapter 3 policies. This application does not fold in the followup regular coastal development permit approval that is required to make permanent the development authorized under an emergency permit. The staff invited the applicant to amend the proposed project to incorporate a slope restoration plan, but they did not do so.

If the Commission denies Coastal Development Permit No. 4-99-211 as recommended by staff, the applicant will still be required to obtain a regular coastal development permit for the grading and vegetation removal undertaken on the site, as required by the emergency permit. The followup permit will address the implementation of a restoration plan for the slope area that was cleared.

Significantly, the applicant was required by the City of Malibu to substantially revise a previous version of the subject proposal in 1998. The required project revisions addressed, among other concerns (such as visual impacts), the interpretation of the top-of-slope and the relationship between constructing the proposed project within the canyon and resultant adverse environmental impacts. The relationship of these issues to the unauthorized grading and vegetation removal undertaken by the applicant is addressed in the ESHA section of this report. To summarize, however, the applicant secured a determination by the City of Malibu that they could rely on a lower slope segment than the Commission staff determined to be appropriate based on the staff's on-site review of the parcel's topography. The result of securing the City's approval for use of the lower contour is that under the City of Malibu's development review, the use of the lower top of slope determination increases by at least 5,000 sq. ft. the portion of the canyon slope that may be developed.

The applicant notified staff that an approved fuel modification plan, with a planting plan consistent with the restoration proposal would be submitted for staff consideration, but the staff only received a preliminary fuel modification plan, which does not include a planting plan or a restoration proposal, on April 12, 2000.

## B. Environmentally Sensitive Habitat Areas; Coastal Waters

Section 30230 of the Coastal Act states:

> Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 of the Coastal Act states:

> The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30240 of the Coastal Act states:

> (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.
>
> (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

In addition, the certified Malibu/Santa Monica Mountains Land Use Plan (LUP) contains policies that provide useful guidance that the Commission has consulted in the past when considering development proposals in the Point Dume area of Malibu for consistency with the policies of the Coastal Act. These policies have been found by the Coastal Commission in certifying the LUP to incorporate the resource protection requirements of Coastal Act Sections 30240 and 30231 for application to specific sensitive resource areas in Malibu and therefore continue to serve as guidance in reviewing proposed development for consistency with Coastal Act policies.

Specifically applicable LUP policies addressing the protection of DSRs and ESHAs and thereby incorporating the resource protection policies that are relevant to the proposed project include:

P 74 New development shall be located as close as feasible to existing roadways, services, and existing development to minimize the effects on sensitive environmental resources.

P 81 To control runoff into coastal waters, wetlands and riparian areas, as required by Section 30231 of the Coastal Act, the maximum rate of storm water runoff into such areas from new development should not exceed the peak level that existed prior to development.

P 82 Grading shall be minimized for all new development to ensure the potential effects of runoff and erosion on these resources are minimized.

P 86 A drainage control system, including on-site retention or detention where appropriate, shall be incorporated into the site design of new developments to minimize the effects of runoff and erosion. Runoff control systems shall be designed to prevent any increase in site runoff over pre-existing peak flows. Impacts on downstream sensitive riparian habitats must be mitigated.

P 87 Require as a condition of new development approval abatement of any grading or drainage condition on the property which gives rise to existing erosion problems. Measures must be consistent with protection of ESHAs.

P 89 In ESHAs and Significant Watersheds and other areas of high potential erosion hazard, require approval of final site development plans, including drainage and erosion control plans for new development prior to authorization of any grading activities.

P 91 All new development shall be designed to minimize impacts and alterations of physical features, such as ravines and hillsides, and processes of the site (i.e., geological, soils, hydrological, water percolation and runoff) to the maximum extent feasible.

The project site includes habitat mapped as a Disturbed Sensitive Resource Area (DSR) on the certified LUP maps; therefore, specifically applicable that provide guidance in evaluating the proposed project include:

Table 1 Policies:

DISTURBED SENSITIVE RESOURCES

- In disturbed riparian areas, structures shall be sited to minimize removal or riparian trees.

- Removal of native vegetation and grading shall be minimized.

- Site grading shall be accomplished in accordance with the stream protection and erosion policies.

- Disturbed, sensitive ravines and canyons at Point Dume should be retained in their existing condition or restored.

## 1.0 Proposed project

As discussed above, the applicant proposes construct a single family residence, guest unit, two garages, a swimming pool, and other attendant development on a 1.05—acre parcel. The subject parcel takes access off Grayfox Street and contains a deep, flat rectangular area that slopes at the rear into, and comprises a portion of, Malibu Riviera Canyon, on Point Dume. The canyon, which is mapped in the LUP as a Disturbed Sensitive Resource Area (DSR), drains into an intermittent stream at the bottom of the canyon, which is a designated blueline stream on the U.S. Geologic Survey quadrangle maps and an Environmentally Sensitive Habitat Area as defined by the Coastal Act. The stream empties into the Pacific Ocean less than one half mile from the applicants' parcel.

## 2.0 Disturbed Sensitive Resource Area

The certified LUP maps show the boundary of the disturbed sensitive resource area at approximately the 90-foot elevation line along the upper edge of Malibu Riviera, Canyon, which coincides with the slope's increasingly steep descent into the canyon. As can be seen on Exhibit 6, the parcel is of relatively low relief until approximately the 90-foot elevation line, which Commission staff believes represents the top-of-slope.

The Commission has found, in past permit actions, that the canyons of Point Dume are disturbed sensitive resource areas. While such areas may contain modified habitats that no longer offer their original, undisturbed biological significance they are nonetheless sufficiently valuable to warrant protection from further impacts. Modified habitats may thus be more vulnerable to damage from the potentially adverse impacts of development in or adjacent to such areas than more pristine areas. For example, undisturbed coastal sage scrub vegetation typical of coastal canyon slopes, and the downslope riparian corridors of the canyon bottoms, ordinarily contains a variety of tree and shrub species with established root systems. Depending on the canopy coverage, these species may be accompanied by understory species of lower profile. The established vegetative cover, including the leaf detritus and other mulch contributed by the native plants, slows rainfall runoff from canyon slopes and staunches silt flows that result from ordinary erosional processes. The native vegetation thereby limits the intrusion of sediments into downslope creeks.

Accordingly, disturbed slopes where vegetation is either cleared or thinned are more directly exposed to rainfall runoff that can therefore wash canyon soils into downgradient creeks. The resultant erosion reduces topsoil and steepens slopes, making revegetation increasingly difficult or creating ideal conditions for colonization by invasive, non-native species that supplant the native populations.

The cumulative loss of habitat cover also reduces the value of the sensitive resource areas as a refuge for birds and animals, for example by making them—or their nests and burrows—more readily apparent to predators.

**3.0 Ecological significance of the Point Dume coastal canyons**

An intermittent blueline stream meanders through the canyon bottom just over 100 feet downgradient of the proposed project, and empties into the Pacific Ocean less than one half of a mile away. The length of Malibu Riviera Canyon supports, in various locations, riparian species such as willow and occasional stands of sycamores, scattered oaks, and extensive stands of coyote bush (*Baccharis pilularis*), the most characteristic shrub species on Point Dume. Mature stands of coyote bush observed by staff in the canyons of Point Dume often form a lush, closed canopy up to breast height. The architecture of healthy, mature stands of coyote bush provide critical cover and refuge for a wide variety of animals and birds that rely on the coastal canyons of Point Dume as the last remnant of significant terrestrial and riparian habitat on the Malibu Riviera Terrace. Coyote bush is the dominant species on the slopes and canyon bottom of the subject site.

The Point Dume canyons have been historically recognized as regionally significant biological resource areas, and were initially designated as part of the Point Dume Significant Ecological Area by Los Angeles County and were subsequently designated as a Disturbed Sensitive Resource Area (DSR) in the certified Malibu/Santa Monica Mountains Land Use Plan (LUP). The LUP recognizes these areas as those environmentally sensitive habitat areas that have been affected by the encroachment of development and that while no longer pristine ecosystems, these sensitive habitat areas are nevertheless environmentally significant due to their rarity in the context of the urbanized setting in which they occur. The canyon habitats of Point Dume are a vanishing refuge for wildlife, and provide critical wildlife corridors.

Point Dume has been described as one of two remaining areas in Los Angeles County where a diverse mixture of terrestrial and marine habitats can be found in close opposition. Significantly contrasting ecosystem types in close proximity to each other often result in unusual species assemblages and rare, transitional or fringe habitats that may be highly limited in occurrence.

The Point Dume headland extends into the Santa Monica Bay more than a mile beyond the rest of the Malibu coast, and is located in the Pacific Flyway. As a result, it is an important resting and jumping off point for migratory birds. Many of migratory bird species therefore rely on the remaining terrestrial habitats in this refuge, including the coastal canyons affected by the subject development of Coastal Development Permit Application No. 4-99-211.

This unusual geographic context is limited in distribution in southern California, and provides critical habitat for breeding, feeding, resting, or migrating grounds for a wide variety of species. Point Dume remains an important habitat for a diversity of bird species, and has long been noted for the unusual number and variety of animal species,

such as raccoons, coyotes, skunks, and foxes that continue to utilize the canyon bottoms despite the encroachment of development. One of the main reasons these species continue to flourish on Point Dume is that the canyon corridors, albeit highly disturbed, nevertheless remain essentially intact and offer small animals and birds the opportunity to move among the corridors in a relatively free manner.

Where the vegetative cover of the canyon slopes remains intact, and unmodified by fuel management programs that trim or clear the characteristic dense coastal sage and chaparral shrub stands, the thick resilient canopy, characteristically deep roots, and protective accumulation of understory residues, such as leaf detritis, collectively provide a highly effective natural filtering and buffering mechanism that protects coastal waters from the intrusion of sediments and other non-point source pollutants.

Such contaminants are commonly discharged from runoff associated with the impervious surfaces that accompany development, and are of intensified concern when such development is located immediately within a sensitive habitat area draining to a blueline coastal stream.

Each incremental increase in new construction or landscaping in previously undeveloped area increases the volume, velocity, and concentration of contaminants in discharged runoff. Development typically increases the discharge of chemical fertilizers, pesticides, soil amendments, eroded soil sediments, oil from automobile losses to driveways, and other sources of chronic non-point source pollution that ultimately enters stream corridors, and ultimately the Pacific Ocean, through the increased volume and velocity of rainfall runoff from developed sites.

Thus, development in or adjacent to sensitive habitat areas and stream corridors poses a range of potentially significant, adverse impacts that individually and cumulatively threaten the continued habitat value, and protective physical functions that contribute to ecosystem stability.

The applicant's consulting biologist, Edith Read, Ph.D. of Psomas and Associates, summarizes the canyon habitat of the site as biologically insignificant and dismisses the impacts of the proposed development as non-existent, asserting that the project will be a benefit to a habitat that will perish entirely if it is not developed in accordance with the applicant's plan. Dr. Read states that the applicant will plant native plant species on the canyon slopes and bottom as part of the required fuel modification plan, and that the implementation of fuel modification on the site will be a benefit of developing the parcel. Dr. Read thereby concludes that the proposed project can only have beneficial effects.

To date the applicant has only submitted a preliminary plan, however, which does not contain a planting plan. However, species approved by the fire department for planting on the canyon slope are those which do not accumulate oils and resins in their tissues (thus increasing flammability), and that mature at a low height – or are artificially pruned to a low height (less than three feet). The majority of typical coastal sage scrub and chaparral species that are found on Point Dume but capable of exceeding three feet in

height would generally not be acceptable to the fire department. Thus, the applicant's final fuel modification plan, which must be approved by the fire department, would result in a highly modified, artificial habitat at best, even if comprised of "native" species.

In addition, the Commission notes that Dr. Read's reports (Exhibits 15 and 16) minimize the value of the most predominant native shrub species on the subject site, coyote bush. Coyote bush, *Baccharis pilularis* is the predominant native shrub in the canyons of Point Dume and is widely cited by the literature on California plant communities as a typical component of coastal sage scrub communities (see various excerpts from the literature in Exhibit 9). In short, coyote bush is not a "depauperate" form of coastal sage scrub, but rather is what one expects to see under present conditions on Point Dume. Dr. Read may be correct that coyote bush flourishes in the coastal canyons as the result of increased water inputs from adjacent development, but it is also a naturally-occurring shrub in this area.

The presence of coyote bush as the dominant native shrub on the subject site offers an additional ecological benefit that Dr. Read overlooked: On Point Dume, when the predominant species is coyote bush, instead of sage or other flammable shrubs and small trees that are also native in the coastal canyons, the Los Angeles County Fire Department, Forestry Division, is willing to reduce the typical 200-foot fuel modification radius from structures that would ordinarily apply, to 100 feet. The fire department foresters have explained that coyote bush does not produce and accumulate flammable oils (terpenes) in its tissues that occur in other typical coastal sage scrub and chaparral shrub species in coastal southern California. Therefore, coyote bush is considered far less flammable than sage and other chaparral shrubs.

In addition to the more liberal treatment by the fire department that coyote bush-dominated habitat enjoys, mature habitat left unmodified for fire protection provides highly effective cover and refuge for small animals and birds, and can grow to a height of six feet or more in the sheltered canyon conditions of Point Dume. The architecture of such cover represents a significant habitat and wildlife corridor, even in a residentially developed area.

In addition, it is not true as the applicant's biological consultant suggests, that the applicant would not be required to improve the canyon habitat that occurs on site if this project is not constructed. As discussed in the summary section, the applicant has undertaken grading and extensive vegetation clearance on the slopes of the subject parcel. An emergency coastal development permit was issued on November 30, 1999 for the placement of temporary slope stabilization measures, but the applicant has not applied for the followup regular coastal development permit for the grading, vegetation clearance, and development authorized by the emergency permit. The application was due in January but has not yet been submitted.

This application does not incorporate the regular permit approval that is required to make the development authorized under the emergency permit permanent. Staff previously invited the applicant to amend the proposed project to incorporate a slope

restoration and replanting plan, but the applicant did not respond. Klaus Radtke, Ph.D., a qualified restorationist, and the applicant's former agent/attorney, Alan Block, met with staff on site to discuss the restoration of the slope and other project concerns. Dr. Radtke observed that the coyote bush was resprouting vigorously and appeared to be well established as the dominant native shrub on the applicant's lot. The applicant did not subsequently submit a restoration plan prepared by Dr. Radtke. In addition, the applicant had previously agreed to submit a final approved fuel modification plan incorporating a planting plan and the necessary restoration measures, but no plans were received. The staff received an approved preliminary fuel modification plan from the applicant on April 12, 2000 but the plan does not contain a planting plan.

Nevertheless, the applicant must obtain a regular permit from the Commission for the unauthorized development. Regular permits for grading and vegetation removal in sensitive resource areas obligate the applicant to take whatever actions the Commission determines are appropriate to restore the affected area, and generally require the preparation and implementation of a restoration plan. Therefore, the applicant is obligated to take actions the Commission determines are appropriate to restore the disturbed area with native plant species acceptable to the Commission regardless of the Commission's decision with regard to pending Coastal Development Permit Application No. 4-99-211, and contrary to the opinion of the applicant's consulting biologist.

In considering this proposal, the Commission evaluates it as though no grading had occurred and the resources are still present.

**4.0 Previous unauthorized grading and vegetation removal will require future site restoration, thus rendering the proposed project's impacts to the sensitive canyon slopes more significant than Dr. Read has acknowledged.**

Moreover, the habitat values Dr. Read finds deficient in the subject area will be largely remedied by the restoration requirements that are likely to be required under the followup permit consideration for the unauthorized grading and vegetation removal. Thus, though there is a temporal displacement between present site conditions and future restoration, the proposed project would affect environmentally significant habitat, even by Dr. Read's stated standards, if allowed to proceed in the area where the restoration will be required.

The applicant's unauthorized grading and vegetation removal is briefly discussed in the first section of the staff report, and more fully below.

A survey of the subject site was undertaken by the applicant's surveyor on July 7, 1998. The applicant told Commission staff and others attending the November, 1999 site visit that the grading and vegetation removal in question had been undertaken before the survey.

John Ainsworth, Malibu regulatory and enforcement supervisor, states that on a visit to the subject site on February 26, 1998 he observed that there was a clear break in the

slope that was heavily vegetated with native and exotic species. The break was very clear and at about the 90 foot contour break on the surveys. At the November 1999 site visit, it appeared that the unauthorized grading had modified the site contours compared to the reported condition of the slope at the earlier site visit.

According to the planning staff of the City of Malibu, the City asked the applicant to revise initial project plans to set the project further back from the slope than the project is presently shown. The City staff indicate that the applicant challenged the City's definition of the "top-of-slope" and the ecological significance of the City's position regarding setbacks from the Environmentally Sensitive Habitat Area of the canyon (see Exhibits 11 and 13), and secured the referenced survey and subsequent City determination that the 80-foot contour would be used to determine top of slope, all within a period of a few months in June—August, 1998.

Exhibit 11 contains the initial argument made to the City by the applicant's biological consultant, Dr. Read, in a letter dated June 12, 1998, that the City's use of top-of-slope limits for development should not be considered relevant for her client's project:

> "…With the information available to me, I understand that the City considers the creek area, while disturbed, to qualify as an environmentally sensitive resource and for the purposes of IZO *(a reference to the City's interim zoning ordinance)* §9.3.03(6)(f). The City requires a minimum 100-foot setback from such resources. According to Craig A. Ewing, City Planning Director, in the past the City has at times requested that development take place on the "top of slope" to comply with the setback. (A. Morgenthaler *(Mrs. Lever)*, telephone conversation with C.A. Ewing, Planning Director, on 6 May, 1998). When delineating disturbed and non-disturbed environmentally sensitive areas, I expect the City could not survey every foot of every canyon/creek area to determine whether the 100-foot setback was necessary in every case. In many circumstances I would agree with this requirement, as a way to ensure that development does not encroach upon valuable flora or fauna, or adversely impact natural stream channels. However, I cannot determine any particular environmental reason for requiring that the footprint be moved to the "top-of-slope" in this instance…"

The survey which was done after the grading and vegetation removal on the subject site was then conducted in July 1998, less than a month after this letter was written.

Less than one month after the July survey, the applicant obtained a copy of a memorandum dated August 6, 1998 by City Planning Director Craig Ewing to his staff regarding the determination of top-of-slope. The memorandum directs staff that where a site has two distinct slope segments descending into a canyon (such as the applicant's site) <u>if the slope aspect of the upper segment does not exceed 4 (horizontal):1(vertical)</u> then the lower slope break will define top-of-slope.

Within three weeks of the date of Mr. Ewing's memorandum to staff, the applicant's attorney wrote a confirming letter to Mr. Ewing asserting that the 80-foot elevation

contour should be used to determine the top-of-slope on the applicant's parcel. An unattributed attachment to the letter purports to show that the upper of two competing slope breaks on the applicant's site fails by a fraction to attain sufficient steepness to qualify as the top-of-slope by the City's 4:1 standard stated in Mr. Ewing's memorandum to staff. The "slope analysis" exhibit shows slopes in the relevant area of not more than 4.0:1 and 4.6:1, thus by elimination designating the 80-foot contour, rather than the 90-foot contour, to be considered the top-of-slope. A fractionally steeper slope aspect would have failed the City test and required the applicant's plans to setback the development envelope that could be authorized by the City to the upper, 90-foot contour.

A determination by the City that the approximately 80-foot contour should be used as the top-of-slope resulted in the authorization by the City staff of a building envelope on the northeastern canyon slope, where the unobstructable ocean view can be obtained without exceeding the City's 18 ft. building limit to protect neighboring private views, that is approximately 5,500 sq. ft. larger than the building envelope that would have been authorized if the 90-foot contour had been determined to represent the top-of-slope.

Based on the staff's site visit and observations of the site contours on February 26, 1998, and subsequently in November of 1999, it appears that the upper slope had been recontoured by the grading the applicant had done without necessary approvals. Despite the changes to the site, the staff concluded that the 90-foot contour still represents the physical top of slope. The Commission staff does not rely upon a mathematical ratio to determine top-of-slope, but rather on an informed, common sense judgment based on site-specific analysis and obvious topographic variations determined in the field and in consultation with topographic maps where relevant. The staff evaluation of feasible project alternatives, therefore, has been made on the basis of evaluating a building envelope that remains available despite setting the building footprint back at least 100 feet from the 90-foot elevation contour as described elsewhere in this report.

While the premature grading and vegetation removal may have yielded an increased building envelope for the proposed project during the City review process, there is no similar result under the Commission's analysis of the project under the Chapter 3 policies of the Coastal Act. Although the applicant's consulting biologist has minimized, and virtually dismissed the biological significance of the portion of the Malibu Riviera Canyon disturbed sensitive resource area on the subject site, the applicant's obligation to obtain a followup regular coastal development permit remains, and will be subject to whatever measures the Commission determines necessary to secure the restoration of the slope.

Commission staff ecologist John Dixon, Ph.D., points out that a degraded habitat can be restored, but a lost habitat cannot. Dr. Dixon also states that a blueline stream corridor together with it's bordering "buffer" (defined as the canyon slopes and vegetation surrounding the coastal streams of Point Dume) should be considered collectively to be

environmentally sensitive habitat area subject to the applicable protective policies of Chapter 3 of the Coastal Act.

Dr. Dixon finds little useful ecological significance to labeling some sensitive habitat areas as "disturbed," when such habitat occurs as a fragile, regionally rare remnant of once extensive habitat. The fact that the habitat is disturbed does not eliminate its ecological value or mean that it is not ESHA. The relative scarcity of the coastal canyon habitats interfacing between marine and terrestrial environments on the Point Dume headlands has been highlighted elsewhere in this report, and supports Dr. Dixon's criteria for considering so-called "disturbed" habitat areas as ESHA for the purposes of applying the protective policies of the Coastal Act.

Dr. Dixon regards the whole of the Point Dume sensitive coastal canyons as ESHA and believes that the fact that these areas are degraded by the intrusion of invasive exotic species, by development such as bridges, paths, fences, decks, and fuel modification—whether authorized or not—serves to underscore the importance of protecting and preserving—and eventually restoring, what remains of these habitat areas.

Thus, the habitat on the slopes of the applicant's site qualifies as sensitive habitat area regardless of its disturbed condition and the applicant's own actions have further disturbed the canyon slope. The applicant's obligation to obtain the necessary followup permits ensures that the Commission will have an opportunity to consider appropriate mitigation measures regardless of whether the presently proposed project is constructed in a separate permit consideration.

**5.0 Proposed project poses <u>avoidable</u> adverse impacts to the canyon habitat**

If the project is constructed in the location presently proposed, significant adverse impacts to the sensitive coastal canyon habitat may result. Much of the vegetation of the canyon slope would be permanently cleared, built upon, or converted to highly modified domestic landscaping that while composed of "native" species does not resemble the structure or function of an unmodified assemblage of native species.

As noted previously, the remaining native vegetation of the entire site would also be highly modified to achieve the requirements of the Los Angeles County Fire Department, which may enforce specific fuel modification requirements up to a zone extending 200 feet from any defensible structure (though on Point Dume, the fire department increasingly authorizes a fuel modification zone of up to 100 feet). The footprint of the applicant's proposed project would require fuel modification to within the stream corridor, even if the lesser 100-foot zone is authorized by the fire department.

The combined removal of the portion of the canyon habitat necessary to place the residence and decks descending the slope on the proposed plan and severe modification and artificial management that will be required for the balance of the canyon habit on the subject site will remove approximately 23,000 square feet of Disturbed

Sensitive Resource Area (DSR) habitat permanently from any possible future restoration effort and will discontinue most of the habitat value represented by the area lost.

**6.0 Affects of development on sensitive canyon habitat due to fuel modification**

In 1996, the County Board of Supervisors adopted the Fuel Modification Ordinance which authorizes the fire department to implement significantly increased vegetation management standards in the Malibu/Santa Monica Mountains area – including requiring the removal or severe thinning of native shrubs, and to restrict the planting of many of the most characteristic coastal sage scrub and chaparral species that would ordinarily occur in these areas.

Prior to the fuel management program, the County only required the clearance of fine, dry fuels up to 100 feet from defensible structures. The County Fire Department, Forestry Division states that even now, structures built before the adoption of the 1996 ordinance are subject (on Point Dume) only to clearance of fine, dry fuels on the subject parcels. Green, healthy shrubbery on the canyon slopes is left untouched on such parcels.

But the new standards require a significant zone of disturbance that substantially exceeds the footprint of the actual structure – and unlike previous versions of the fire department requirements, may even extend offsite onto adjacent lands—in order to achieve compliance with the new fuel modification guidelines.

For these reasons, development authorized since 1996 carries with it the requirement of performing significant vegetation clearance, thinning, irrigation, and landscaping or restoring habitat with a highly restrictive palette of native species (most of the characteristic species of the locally native chaparral or coastal sage communities are unacceptable for new plantings within the fuel modification zones).

As the impacts of these requirements have begun to be felt in specific projects approved by the Commission since 1996, it has become clear that to avoid fuel modification in sensitive habitats, such as the coastal canyons of Point Dume, proposed development must be evaluated for alternatives, such as relocation elsewhere on a particular site, and/or the redesign of some projects, that will avoid fuel modification in the canyons.

Thus, because of the Coastal Act policy requiring protection of sensitive coastal canyons and of the significant, adverse impacts visited upon the fragile, disturbed canyon vegetation and wildlife habitats by recent fuel modification requirements, the Commission has directed staff to identify project alternatives, where feasible, that will avoid these impacts to the canyon corridors.

Under the Coastal Act the Commission must also avoid the cumulative, adverse effects to the sensitive coastal canyon habitats that occur from construction within or adjacent to the canyon slopes. Individually, many projects in Point Dume seem relatively

insignificant. Considered on a cumulative basis, however, significant impacts may occur as the result of minor changes on particular sites.

In response, staff has thoroughly evaluated the presently proposed project and determined that one or more feasible alternatives do exist that would avoid the most significant adverse impacts to the canyon habitats that would be expected if the proposed project is implemented.

**7.0 Applicant opposes project alternative due to potential reduction or loss of ocean view**

A substantial residence could alternatively be developed on the upper terrace of the subject site, thereby avoiding all adverse impacts to the canyon slope and stream corridor that would result from the building location presently proposed by the applicant. However, the applicant has not agreed to relocate or redesign the proposed project as suggested by staff. The applicant asserts that any degree of project relocation would reduce the private bluewater ocean views that the applicant seeks to obtain by building the proposed residence as presently designed and located on the canyon slope. If the project were relocated 100 feet streetward of the top-of-slope, thereby avoiding all direct adverse impacts to the sensitive habitat (including those caused by fuel modification), a residence of alternative design could likely be constructed, but it might not obtain bluewater views.

**8.0 Conclusion:**

For all of the reasons set forth above, the Commission finds that the proposed project would adversely affect environmentally sensitive habitat areas (ESHAs) and buffer areas adjacent to ESHAs and would therefore be inconsistent with the requirements of Coastal Act Section 30240. In addition, the adverse impacts of the proposed project would degrade the vegetation of habitat corridors adjacent to an environmentally sensitive, designated blueline stream that outlets to the Pacific Ocean and the offshore kelp beds of Point Dume, which are also designated as ESHAs in the certified Malibu/Santa Monica Mountains Land Use Plan The biologically productive kelp beds off Point Dume are well known as a significant coastal resource adjacent to the rocky intertidal habitat along that section of the coastline. The kelp beds provide critical habitat underlying fisheries that help to support, for example, the population of sea lions that haul out nearby. Juvenile fish find cover from predators within the kelp fronds and hold-fasts, and an entire. The Regional Water Quality Control Board has designed the kelp habitat as an area of special biological significance and has identified this resource as particularly prone to damage by water and sediment pollution discharged into Santa Monica Bay from upstream sources.

The increased runoff from the proposed project combined with the reduction in habitat coverage and other affects outlined more specifically above would lead to erosion, increased infiltration into the stream of contaminated runoff, and loss of the buffering function of the canyon vegetation. Contaminated discharge and increased sediments

from the stream would in turn contribute pollution to the nearshore waters upon which the health of the kelp beds, and their biological productivity depends. These impacts would compromise the biological productivity of coastal waters, and directly reduce the habitat value of environmentally sensitive habitat areas --all inconsistent with the policies of Coastal Act Sections 30230, 30231 and 30240 set forth above. The Commission therefore finds that the proposed project is inconsistent with the applicable policies of Chapter 3 of the Coastal Act protective of environmentally sensitive habitat, coastal waters, and marine resources.

## B. Locating New Development; Hazards, Landform Alteration

Coastal Act **Section 30250** states in pertinent part that:

> (a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels.

Coastal Act **Section 30251** states that:

> The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

Coastal Act **Section 30253** states in pertinent part that:

> New development shall:
>
> (1) Minimize risks to life and property in areas of high geologic, flood, and
>
> (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

In addition, the Malibu LUP, which the Commission has utilized as guidance in past permit decisions, contains policies applicable to the proposed project:

P 82 Grading shall be minimized for all new development to ensure the potential negative effects of runoff and erosion on these resources are minimized.

P 86 A drainage control system, including on-site retention or detention where appropriate, shall be incorporated into the site design of new developments to minimize the effects of runoff and erosion. Runoff control systems shall be designed to prevent any increase in site runoff over pre-existing peak flows. Impacts on downstream sensitive riparian habitats must be mitigated.

P 91 All new development shall be designed to minimize impacts and alterations of physical features, such as ravines and hillsides, and processes of the site (i.e., geological, soils, hydrological, water percolation and runoff) to the maximum extent feasible.

P 147 Continue to evaluate all new development for impact on, and from, geologic hazard.

P 149 Continue to require a geologic report, prepared by a registered engineer.

P 154 Continue to review development proposals to ensure that new development does not generate excessive runoff, debris, and/or chemical pollution that would have a significantly negative impact on the natural hydrologic systems.

**1.0 Proposed project includes 1,479 cu. yds. of grading on a canyon slope**

As described previously, the applicant proposes to construct a 5,035 sq. ft. single family residence with a 1,034 sq. ft. garage; a guest unit with attached garage, a swimming pool and other appurtenant structures on a 1.05-acre site taking access off Grayfox Street, in the Point Dume area of Malibu. The applicant proposes to build the residence along and down the descending canyon slope of Malibu Riviera Canyon, which is an environmentally sensitive habitat area (ESHA) described in the previous section. A designated blueline stream follows the contours of the canyon bottom, outletting to the Pacific Ocean less than one half mile downstream from the bottom of the slope on the subject site.

The applicant's proposal includes grading approximately 1,479 cu. yds. of material (1,181 cu. yds. cut, 298 cu. yds. fill). The applicant proposes to dispose of the excess cuttings (883 cu. yds.) at an unspecified area outside of the coastal zone.

**2.0 Proposed project does not minimize the alteration of natural landforms within the meaning of Coastal Act Section 30251**

Coastal Act Section 30251 states that among other requirements, permitted development shall be sited and designed to minimize the alteration of natural land forms. The applicant proposes to construct the proposed project in part on a canyon

slope. Most of the proposed grading is for the purpose of excavating and preparing the slope area. As discussed extensively in previous sections, one or more feasible alternatives exist that would allow the construction of a single family residence on the relatively level building pad that already exists adjacent to the parcel entrance off Grayfox Street. Construction on the alternative project location, the level area of the site, would eliminate the need for most of the proposed grading, except for the minimal amount needed to excavate structural footings and swimming pool area, and to groom the construction pad. Thus, the project as proposed will result in excessive, avoidable alteration of the natural landform—the slope of Malibu Riviera Canyon. Therefore, the proposed project is inconsistent with the requirements of Coastal Act Section 30251.

**3.0 Construction on canyon slope will create or increase erosion within the meaning of Section 30253 (b) and will result in individual and cumulative significant adverse effects on coastal resources within the meaning of Section 30250.**

Coastal Act Section 30253 (b) states that new development shall neither create nor increase erosion. The proposed project, as stated, would construct a new single family residence on the slope of a coastal canyon designated as an environmentally sensitive habitat area. The proposal includes almost 1,500 cu. yds. of grading – the majority of which is excavation. The disturbance of grading on a fragile canyon slope will significantly increase the likelihood of slope erosion due to sheetflow rainfall runoff, in addition to drainage from the discharge of runoff from the increased impervious surfaces of the proposed new construction.

The proposal will also change site hydrology, expose soils on the natural slope to the erosive forces of rain and wind, require perennial fuel modification and landscaping, and reduce the extent and unmodified condition of natural vegetation in the canyon habitat area. The fire department fuel modification requirements will extend to the downslope blueline stream channel lining the canyon bottom at the lower boundary of the applicant's parcel.

In addition, it is now generally acknowledged that urban development, with increased impervious surfaces, oil-contaminated runoff from streets and driveways, and sedimentation of streams from construction-related erosion may be one of the most critical components of coastal water quality degradation. Thus providing sufficient setbacks from sensitive coastal canyons containing stream corridors is now understood as a key means of protecting the quality of coastal waters.

As discussed previously, the proposed project poses individually significant, avoidable adverse affects upon environmentally sensitive habitat in Malibu Riviera Canyon and threatens the water quality of the downslope intermittent stream. The project's impacts also pose cumulative impacts to coastal resources, reducing the habitat value of a critical link in a primary Point Dume wildlife corridor and threatening the quality and biological productivity of the kelp beds and intertidal habitat adjacent to the outlet of the canyon creek. The creek will be subject to increased sedimentation and infiltration by

contaminated sediments in urbanized site runoff as the result of the proposed development on the canyon slope descending into the stream corridor on the subject site.

### 4.0 Conclusion

Feasible alternatives have been identified that would avoid the individual and cumulative adverse affects posed by the proposed project on sensitive coastal resources. In addition, relocation/redesign of the proposed project on the level terrace area of the subject site would eliminate all of the direct, adverse effects the project would have on the sensitive canyon habitat. These alternatives, which the Commission believes could be favorably considered if consistent with other applicable policies of the Coastal Act, have not been submitted by the applicant. Therefore, for all of the reasons set forth above, the Commission finds that the project as proposed is inconsistent with the applicable policies of Coastal Act sections 30250, 30251, and 30253.

## D. Local Coastal Program

**Section 30604** of the Coastal Act states that:

> a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

Section 30604(a) of the Coastal Act provides that the Commission shall issue a Coastal Permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program which conforms with Chapter 3 policies of the Coastal Act. The preceding sections provide findings that the proposed project would not be in conformity with the provisions of Chapter 3 of the Coastal Act. The proposed development would result in adverse effects and is found to be not consistent with the applicable policies contained in Chapter 3. Therefore, the Commission finds that approval of the proposed development would prejudice the City of Malibu's ability to prepare a Local Coastal Program which is also consistent with the policies of Chapter 3 of the Coastal Act as required by Section 30604(a).

## E. CEQA

Section 13096(a) of the Commission's administrative regulations requires Commission approval of Coastal Development Permit application to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being

approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The Commission finds that the proposed project would result in significant adverse effects on the environment, within the meaning of the California Environmental Quality Act of 1970. The Commission also finds that there are feasible alternatives to the proposed project that would substantially lessen the significant adverse effects on the environment. Therefore, the proposed project is determined to be inconsistent with CEQA and the policies of the Coastal Act.

MKH-4/25/00

# List of Exhibits

Exhibit 1: Regional Map

Exhibit 2: Area Map

Exhibit 3: Parcel Map

Exhibit 4: Site Plan

Exhibit 5: 8-1/2 x 11-inch reductions of project plans

Exhibit 6: Illustrative cross section of slope elevations prepared by Commission staff

Exhibit 7: Appraisal report prepared April 7, 2000 by Adler Realty Advisors, Inc.

Exhibit 8: 16-page position paper prepared by Donald Schmitz, dated April 11, 2000, received April 12, 2000 at the Ventura District Office.

Exhibit 9: Excerpts from:"California Plant Life," by Robert Ornduff, University of California Press, 1974;"A Vegetation Classification System Applied to Southern California," U.S.D.A., Pacific Southwest Forest and Range Experiment Station, General Technical Report PSW-45, December 1980;"Terrestrial Vegetation of California," Chapter 13, "Southern Sage Scrub," by Harold A. Mooney, Department of Biological Sciences, Stanford University, 1977;"A Guide to Wildlife Habitats of California," California Department of Forestry and Fire Protection, October 1988.

Exhibit 10: Labeled Aerial Photographs of Point Dume Area prepared by applicant

Exhibit 11: Report of Applicant's Biological Consultant, Edith Read, Ph.D., Psomas and Associates, dated June 12, 1998, addressed to City of Malibu staff.

Exhibit 12: Letter of Dr. Read (see Exhibit 11) dated March 20, 2000, addressed to Commission staff.

Exhibit 13: Documents regarding top-of-slope determination.